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No. 886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SOUTH ATLANTIC & GULF COAST DISTRICT OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, ET AL.,

Petitioners,

v.

HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT AT HOUSTON, TEXAS

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
STATEMENT	1
THE INTEREST OF THE STATE	2
ARGUMENT	2
I. The decisions below do not conflict with any decision of this Court, or with the Constitution or any law of the United States	3
II. The National Labor Relations Board has no jurisdiction over the respondent employer, Harris County-Houston Ship Channel Navigation District, in this case, as respondent is a Governmental Agency and Political Subdivision of the State of Texas	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX A	1a
APPENDIX B	1b

TABLE OF AUTHORITIES

Allen-Bradley Local 1111 v. WERB, 315 U.S. 740 (1941)	4
Amalgamated Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957)	9
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	4
Building Service Employers International Union Local 262 v. Gazzam, 339 U.S. 532 (1949)	5
City of Alcoa v. International Brotherhood of Electrical Workers, 203 Tenn. 12, 308 S.W. 2d 476 (1957)	10
City of Detroit v. Division 26, etc., Street Electrical Railway and Motor Coach Employees, 332 Mich. 237, 51 N.W. 2d 228 (1952), cert. denied, 344 U.S. 805 (1952)	6
City of Los Angeles v. Los Angeles Bldg. & Construction Trades Council, 210 P. 2d 305 (Cal. App. 1949)	6

TABLE OF AUTHORITIES — Continued

	Page
Garner v. Teamsters, 356 U.S. 485	9
Hughes v. Superior Court, 339 U.S. 460 (1949)	4
International Brotherhood v. Grand River Dam Authority, 292 P. 2d 1018 (Okla. 1956)	10
International Brotherhood of Teamsters, etc., v. Vogt, 354 U.S. 284 (1957)	5
International Longshoremen's Association v. Georgia Ports Authority, 217 Ga. 212, 124 S.E. 2d 733 (1962), cert. denied, 370 U.S. 922 (1962)	8, 10
Local Union No. 10 v. Graham, 345 U.S. 192 (1952)	5
Mobile Steamship Association, et al., 8 N.L.R.B. 1297 (1938)	10
NLRB v. Fansteel Corporation, 306 U.S. 240 (1936)	4
NLRB v. Sands Manufacturing Company, 306 U.S. 332 (1936)	4
New Bedford Steamship Authority, 127 N.L.R.B. 1322 (1960)	9, 10
Norwalk Teachers' Ass'n v Board of Education, 138 Conn. 269, 83 A. 2d 482 (1951)	7
Papermakers Importing Co., Inc., 116 N.L.R.B. 267 (1956)	9
Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wash. 2d 317, 324 P. 2d 1099 (1958)	7
San Diego Building Trades Council, Millmen's Union Local 2020 v. Garmon, 359 U.S. 226 (1959)	8
Southern SS Company v. NLRB, 316 U.S. 31 (1941)	4
United Public Workers v. Mitchell, 330 U.S. 75 (1946)	3
Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955)	9

CONSTITUTION AND STATUTES

Section 152(2), Title 29 U.S.C.A.	9
Section 152(3), Title 29 U.S.C.A.	9
Texas Constitution, Article XVI, Section 59	2
Article 5154(c), Texas Revised Civil Statutes (App. A)	1a

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BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This brief is filed by the State of Texas in accordance with Rule 42 of this Honorable Court.

The purpose of the brief is to urge that the laws and public policy of the State of Texas which prohibit strikes by public employees do not abridge the right of freedom of speech secured to Petitioners by the First and Fourteenth Amendments to the Constitution of the United States; and that the courts of the State of Texas may lawfully regulate strikes by public employees.

THE INTEREST OF THE STATE

The State of Texas has laws which are designed to insure to all Texas citizens continuous, uninterrupted governmental services. This matter of the public interest is insured to all Texas citizens by the laws of this State which prohibit public employees from engaging in strikes against their governmental employer (App. A, pp. 1a-2a). The attack being made on these laws in this case directly challenges the rights of all citizens of the State of Texas.

Respondent is a governmental agency and a political subdivision of the State of Texas existing under Article XVI, Section 59, of the Constitution and the laws of the State of Texas (App. B, pp. 2b, 3b).

The interest of Texas in presenting its argument in support of the constitutionality of its laws banning strikes by public employees as a means of protecting all of the citizens of the State of Texas and the public interest, is equal to the interest of Respondent in this case in presenting like argument.

ARGUMENT

I.

THE DECISIONS BELOW DO NOT CONFLICT WITH ANY DECISION OF THIS COURT, OR WITH THE CONSTITUTION OR ANY LAW OF THE UNITED STATES.

Petitioners stipulated during the trial of this cause that Respondent is a governmental agency and political subdivision of the State of Texas (App. B, pp. 2b, 3b). Petitioners further stipulated during the trial that the employees of the Respondent refused to perform

work scheduled to be performed by them by Respondent (App. B, p. 5b).

Article 5154c of the Texas Revised Civil Statutes (App. A, 1a-2a) declares, in part, that it is against the public policy of the State of Texas for public employees to engage in strikes or organized work stoppage against the State of Texas or any political subdivision thereof.

Petitioners herein strenuously contend that their rights of freedom of speech guaranteed under the Constitution and the laws of the United States were denied them by the issuance of injunctions by the Trial Court and decisions of the Court below. Contrary to the contentions voiced by Petitioners, the authorities of this Honorable Court established with abundant clarity that the Petitioners' right of free speech has not been unconstitutionally or unlawfully abridged by the injunctions issued below.

Petitioners attack the constitutionality of Article 5154c. The decisions of this Honorable Court abundantly demonstrate that such an attack is without merit.

This Honorable Court has held in a number of cases that limitations on the rights of governmental employees may be affected without any abridgement of constitutional rights. For example, in *United Public Workers v. Mitchell*, 330 U.S. 75, this Honorable Court held that the Hatch Act, which prohibits governmental employees from engaging in certain types of political activities, was constitutional. In upholding the constitutionality of the Hatch Act, the Court stated:

> "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolute. The requirements of residence and age must

be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery." (Page 95.)

Likewise, the decisions of this Honorable Court unequivocally establish that a state does not have to permit picketing for all purposes to be conducted. This Honorable Court has repeatedly held that picketing for an unlawful object is not constitutionally privileged and may be banned by the States. Illustrative of unprotected conduct that State Courts have power to prevent are: sitdown strikes, *NLRB v. Fansteel Corporation*, 306 U.S. 240; mutinies, *Southern SS Company v. NLRB*, 316 U.S. 31; strikes and picketing accompanied by violence, *Allen-Bradley Local 1111 v. WERB*, 315 U.S. 740; strikes in violation of contract, *NLRB v. Sands Manufacturing Company*, 306 U.S. 332; and picketing to secure more favorable terms of employment in violation of an agreement, *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138.

In *Hughes v. Superior Court*, 339 U.S. 460, this Court upheld the constitutionality of the State law against picketing because of its unlawful purpose, stating:

"The domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states Palko v. Connecticut, 302 U.S. 319, 327, 82 L. ed. 288, 293, 58 S. Ct. 149, no doubt includes liberty of thought and appropriate means for expressing it. But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite ir-

respective of the nature of the ideas which are being dissiminated.' * * * However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives grounds for its disallowance. . . . A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." (Pages 464-465.)

Accord: *Local Union No. 10 v. Graham*, 345 U.S. 192; *Building Service Employers International Union, Local 262 v. Gazzam*, 339 U.S. 532.

This Honorable Court in *International Brotherhood of Teamsters, etc. v. Vogt*, 354 U.S. 284, after reviewing numerous decisions involving picketing and wherein contentions that deprivation of constitutional privilege had been asserted, stated:

"This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at *preventing effectuation of that policy.*" (Page 293.) (Emphasis supplied.)

Rehearing in the *Vogt* case was denied at 354 U.S. 945.

In *Local Union No. 10 v. Graham, supra*, this Honorable Court further elaborated on the right of the State to enjoin peaceful picketing, thusly:

"The basic question here is whether the Commonwealth of Virginia, consistently with the Constitution of the United States, may enjoin peaceful

> picketing where it is carried on for purposes in conflict with the Virginia Right to Work Statute. A question also before us is whether the record in this cause justifies the findings, made below, that picketing was for such purposes. We answer each in the affirmative." (Page 193.)

State courts have universally upheld the constitutionality of state statutes prohibiting strikes against governmental agencies. For example, in the *City of Detroit v. Division 26 of Amalgamated Association*, 51 N.E. 2d 228, the Michigan Supreme Court held that a state statute which prohibited strikes against governmental agencies was constitutional as it did not violate the United States Constitution nor the State's Constitution. The Court held:

> ". . . It cannot be held, as defendants and cross-appellant contend, that by the Hutcheson Act the striking employees of Detroit Street Railway System are subjected to a statute which violates the United States Constitution, Article I, Section 10 of the State Constitution, Article II, Section 9, prohibiting passage of bills of attainder; nor are they deprived of rights without due process of law, United States Constitution, Fifth Amendment; the State Constitution, Article II, Section 16; nor the equal protection of the laws, United States Constitution, Fourteenth Amendment; State Constitution, Article II, Section 1 * * * The Hutcheson Acts cannot be held unconstitutional on any of the grounds just above noted." (Page 235.)

The Union's appeal to this Honorable Court from the decision of the Michigan Supreme Court was dismissed per curiam in 344 U.S. 805 on the grounds that no constitutional question was raised and rehearing was denied by the Court in 344 U.S. 882.

Accord: *City of Los Angeles v. Los Angeles Building*

and Construction Trades Council, 210 P. 2d 305; *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wash. 2d 317, 324 P. 2d 1099.

In *Norwalk Teachers' Ass'n. v. Board of Education*, 138 Conn. 269, 83 A. 2d 482 (1951), the Court stated:

> "Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle. It has been so regarded by the heads of the executive departments of the states and the nation.
>
> * * *
>
> "In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare. The answer to question (c) is 'No'." (Pages 484, 485.)

Finally, the constitutional contention regarding infringement on the right of freedom of speech, as the one being made in this case, was presented by the Union

in *International Longshoremen's Association v. Georgia Ports Authority,* 217 Ga. 212, 124 S.E. 2d 733 (1962). In that case, as in the instant case, the Union picketed a governmental port authority to force the governmental agency to accede to the demands that persons being represented by the Union be given employment. The Georgia Supreme Court affirmed the Trial Court's injunction enjoining a strike by the employees of the governmental port authority and the picketing by the Union. The Union's Petition for Certiorari to this Honorable Court was denied in that case at 370 U.S. 922 on June 18, 1962.

II.

THE NATIONAL LABOR RELATIONS BOARD HAS NO JURISDICTION OVER THE RESPONDENT EMPLOYER, HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, IN THIS CASE, AS RESPONDENT IS A GOVERNMENTAL AGENCY AND POLITICAL SUBDIVISION OF THE STATE OF TEXAS.

Petitioners contend that the Court below erroneously intervened to enjoin and restrain their conduct in the instant case on the grounds that the labor dispute involved is either arguably protected or prohibited by the provisions of the National Labor Relations Act, as amended.

The doctrine of Federal Preemption was most broadly stated by the United States Supreme Court in *San Diego Building Trades Council, Millmen's Union Local 2020 Building Material and Dump Drivers Local 36 v. Garmon,* 359 U.S. 226, that when an activity is arguably protected by Section 7 of the National Labor Relations Act, or is arguably prohibited by Section 8

of the National Labor Relations Act, the State Courts, as well as the Federal Courts, must defer to the exclusive competence of the National Labor Relations Board. Other cases in general accord: *Garner v. Teamsters*, 356 U.S. 485; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20; *San Diego Building Trades Council v. Garmon*, 353 U.S. 26.

The National Labor Relations Act, as amended, however, does not purport to regulate *governmental or public* employer-employee relations, and accordingly the contention that the labor dispute involved in the instant case is either arguably protected or prohibited under the provisions of the National Labor Relations Act, as amended, is patently inapplicable.

The National Labor Relations Act, as amended, Section 2(2), provides, in part, as follows:

> "The term 'employer' . . . shall not include . . . any state or political subdivision thereof. 29 U.S.C.A. Sec. 152(2).

Section 2(3) of the Act states in part as follows:

> "The term 'employer' . . . shall not include any individual employed . . . by any . . . person who is not an employer as herein defined." 29 U.S.C.A. Sec. 152(3).

The National Labor Relations Board has given effect to the unambigious exclusionary wording of Sections (2) and (3): *Papermakers Importing Co., Inc.*, 116 N.L.R.B. 267; *New Bedford Steamship Authority*, 127 N.L.R.B. 1322. The National Labor Relations Board has consistently refused, and not merely declined, Federal jurisdiction over employers similar to the Respondent herein. The National Labor Relations Board

in *New Bedford Steamship Authority, supra,* held that:

> "Section 2(2) of our Act, in relevant part, and its predecessor in the Taft-Hartley and Wagner Acts, provides that 'The term "employer" . . . shall not include the United States . . . or any State or political subdivision thereof . . . .' Since the appearance of this language and the original or Wagner Act, the Board has consistently held that it was deprived of jurisdiction over governmental employers, i.e., the United States or any State or political subdivision of a State."

Accord: *Mobile Steamship Association, et al.,* 5 N.L.R.B. 1297 (1938).

Several decisions of other state courts are in accord with the decision of the Court below in cases dealing with governmental agencies. *International Longshoremen's Association v. Georgia Ports Authority, supra; International Brotherhood v. Grand River Dam Authority,* 292 P. 2d 1018 (Okla. 1956); *City of Alcoa v. International Brotherhood of Electrical Workers,* 203 Tenn. 12, 308 S.W. 2d 476 (1957).

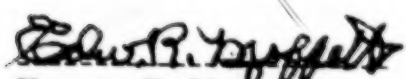
In the recent decision in *International Longshoremen's Association v. Georgia Ports Authority, supra,* essentially the same propositions were presented as are now being urged by Petitioners in this case. The Georgia Supreme Court rejected the contention that the jurisdiction of the state court was preempted, and instead held that the term "employer" and the term "employee" as defined in the National Labor Relations Act, as amended, excludes political subdivisions of a state and its employees, and affirmed the Trial Court's injunction issued to the governmental port authority. The Union's request for Writ of Certiorari was denied by this Honorable Court in that case at 370 U.S. 922 on June 18, 1962.

CONCLUSION

The State of Texas respectfully submits that this request shows no basis upon which the Writ of Certiorari should be granted. The State of Texas further submits that it has shown this Honorable Court that the decisions rendered below was in strict accordance with previous decisions of this Court and adjudicated no new federal question of substance. For these reasons, the State of Texas respectfully requests that the Writ of Certiorari be denied.

WAGGONER CARR
Attorney General of Texas

PAUL R. ROBERTSON
Assistant Attorney General



EDWARD R. MOFFETT
Assistant Attorney General

Capitol Station

Austin 11, Texas

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of April, 1963, a copy of the foregoing Brief of The State of Texas, Amicus Curiae, in Opposition to Petition for Writ of Certiorari, was served on Counsel for Petitioners, Arthur J. Mandell, Esq., 707 South Coast Building, Houston 2, Texas, and Sewell Myer, Esq., 1410 First City National Bank Building, Houston 2, Texas, by depositing a true and correct copy thereof in the United States mails, postage prepaid, addressed to said attorsaid addresses.

Edward R. Moffett

EDWARD R. MOFFETT
Assistant Attorney General

APPENDIX A

ARTICLE 5154c OF THE TEXAS REVISED CIVIL STATUTES

"Section 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

"Sec. 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

"Sec. 3. It is declared to be against the public policy of the State of Texas for public employees to engage in strikes or organized work stoppages against the State of Texas or any political subdivision thereof. Any such employee who participates in such a strike shall forfeit all civil rights, re-employment rights and any other rights, benefits, or privileges which he enjoys as a result of his employment or prior employment, providing, however, that the right of an individual to cease work shall not be abridged so long as the individual is not acting in concert with others in an organized work stoppage.

"Sec. 4. It is declared to be the public policy of the State of Texas that no person shall be denied public employment by reason of membership or nonmembership in a labor organization.

"Sec. 5. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or condition of work.

"Sec. 6. The provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike.

"Sec. 7. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p. 231, ch. 135."

APPENDIX B

No. 585,712

HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, *Plaintiff*, v. SOUTH ATLANTIC & GULF COAST DISTRICT OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., *Defendants*.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 151ST JUDICIAL DISTRICT

STIPULATIONS

It is hereby stipulated by and between Harris County-Houston Ship Channel Navigation District, Plaintiff, and South Atlantic & Gulf Coast District of The International Longshoremen's Association, Independent (hereinafter referred to as District), Ralph A. Massey, as a representative of said District, Paul F. Koehne, as a representative of said District, International Longshoremen's Association, Local 872, Raymond Duncan, as a representative of said Local 872, International Longshoremen's Association, Local 1273, Willie C. Wells and Jim Clark, as representatives of said Local 1273, International Longshoremen's Association, Local 1530, Lloyd Allen, as a representative of said Local 1530, Defendants, that the following facts may be taken as true, solely for the purpose of this litigation.

I.

Harris County-Houston Ship Channel Navigation District is a governmental agency of the State of Texas, and is a political subdivision thereof, the same existing under Article XVI, Sections 52 and 59 of the Constitution and laws of the State of Texas, and is domiciled in Harris County, Texas.

Defendant South Atlantic & Gulf Coast District of the International Longshoremen's Association, Independent, is a labor organization within the meaning of the law of the State of Texas which represents employees in Houston, Harris County, Texas, and said District has an office and place of business in Galveston, Galveston County, Texas, Defendant Ralph A. Massey is an officer and a representative of said District, and said Defendant resides in Houston, Harris County, Texas. Defendant Paul F. Koehne is an officer and a representative of said District and resides in Houston, Harris County, Texas. Defendant International Longshoremen's Association, Local 872, is a labor organization within the meaning of the laws of the State of Texas, affiliated with said District and said Local 872 has its principal place of business in Houston, Harris County, Texas. Defendant International Longshoremen's Association, Local 1273, is a labor organization within the meaning of the laws of the State of Texas, affiliated with said District and said Local 1273 has its principal place of business in Houston, Harris County, Texas. The Defendants Willie C. Wells and Jim Clark are officers and representatives of said Local 1273 and both reside in Houston, Harris County, Texas. The Defendant International Longshoremen's Association, Local 1530, is a labor organization within the meaning of the laws of the State of Texas, affiliated with said

District and said Local 1530 has its principal place of business in Houston, Harris County, Texas. Defendant Lloyd Allen is an officer and a representative of said Local 1530 and resides in Houston, Harris County, Texas.

II.

Plaintiff is a governmental agency of the State of Texas, and is a political subdivision thereof, and owns and operates large and extensive wharves, warehouse facilities, grain elevators, bulk materials, handling facilities, which are operated in competition with private industry in the Port of Houston. At Plaintiff's wharves it receives and delivers various types of cargo to and from ships; in its warehouses it handles, receives, stores, preserves and delivers various types of goods, wares, merchandise and commodities; in connection with the operations of its grain elevator, it receives, stores and ultimately discharges grains for domestic and foreign shipment; and, in connection with its bulk handling facilities, it receives and discharges dry bulk materials moving through the Port of Houston into and outside of the United States of America.

III.

Plaintiffs and Defendants agree that during 1961 a bulk materials handling plant was constructed at a cost of approximately $4,000,000.00 on Plaintiff's property in Harris County located adjacent to the Houston Ship Channel at Green Bayou. The funds expended in connection with the construction of said plant were raised by the sale of bonds repayable from the revenue to be derived from said plant and the other facilities of Plaintiff.

IV.

Plaintiff began its operations of the Bulk Materials Handling Plant on or about September 21, 1961. Prior to the beginning of such operations, Plaintiff assigned its employees to various jobs in said plant.

V.

On or about January 5, 1962, representatives of said District and representatives of said Locals 872 and 1273 requested that certain work at the Bulk Materials Handling Plant be performed by members of said Locals 872 and 1273 and other persons working through the hiring halls of these Local Unions. As Plaintiff refused, Defendant Locals 872 and 1273 at approximately 7:30 a.m. on January 6, 1962, caused two (2) pickets to be established at the intersection of Penn City Road and the only road leading into said Bulk Materials Handling Plant. One of said pickets carried a sign which read as follows:

Labor Dispute
with
ILA Local No. 1273
Longshoremen

The other said picket carried a sign which read as follows:

Harris County Houston Ship Channel
Navigation District
Gulf Has A Stevedores
Labor Dispute
with
ILA Local No. 872
Longshoremen

At the time of the establishment of said picket lines, a ship RAMON de LARRINAGA was moored at Plaintiff's Bulk Materials Handling Plant awaiting to be unloaded. The cargo of said ship consisted of approximately 5,000 tons of zinc concentrate and the same was to be unloaded into railroad cars by the use of Plaintiff's facilities. When Plaintiff's employees who were scheduled to work at said plant arrived at approximately 8 A.M. on January 6, 1962, each of them refused to cross the picket lines. As a result, Plaintiff was unable to begin unloading the cargo of said ship. At approximately 3 P.M. on January 6, 1962, said picket lines were taken down long enough to permit certain members of Local 1273 to enter Plaintiff's premises and go aboard said vessel and to be available for work as required by Court Order entered in another proceeding, but immediately thereafter, said picket lines were re-established and Plaintiff's employees continued their refusal to cross the picket lines.

VI.

Officers and representatives of said District and said Locals 1273 and 872 have requested and continue to request that certain of the work at the Bulk Materials Handling Plant be performed by members of said Locals 1273 and 872, and by other persons working through the hiring halls of these Local Unions.

This stipulation shall be without prejudice to the right of any party to introduce additional evidence of any kind.

Dated at Houston, Texas, this the 16th day of January, 1962.

Approved And Agreed To:

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
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/s/ PAUL R. ROBERTSON
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